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April 11, 1995

BY HAND DELIVERY

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street N.W., Room 222
Washington, D.C. 20554

Re: In the Matter of Telephone Company Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266; and Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service, RM-8221

Dear Mr. Caton:

Enclosed for filing is an original and four copies of the Reply Comments of Fox Broadcasting Company, Fox Television Stations Inc., and Fox Basic Cable, Inc. Please return to our messenger a date-stamped copy of the enclosed (copy provided).

If you have any questions about this matter, please contact the undersigned.

Sincerely,

William S. Reyner, Jr.
Counsel for Fox Broadcasting Company,
Fox Television Stations Inc.,
and Fox Basic Cable, Inc.

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Telephone Company-	)	CC Docket No. 87-266
Cable Television	)	
Cross-Ownership Rules,	)	
Sections 63.54-63.58	)	
	)	
and	)	
	)	
Amendments of Parts 32, 36,	)	RM-8221
61, 64, and 69 of the	)	
Commission's Rules to	)	
Establish and Implement	)	
Regulatory Procedures for	)	
Video Dialtone Service	)	

REPLY COMMENTS OF FOX BROADCASTING COMPANY, FOX TELEVISION STATIONS INC. AND FOX BASIC CABLE, INC.

William S. Reyner, Jr.
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Counsel for Fox Broadcasting Company, Fox Television Stations Inc., and Fox Basic Cable, Inc.

April 11, 1995

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58	)	CC Docket No. 87-266
	)	
and	)	
	)	
Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	)	RM-8221

REPLY COMMENTS OF
FOX BROADCASTING COMPANY,
FOX TELEVISION STATIONS INC.
AND FOX BASIC CABLE, INC.

Fox Broadcasting Company, Fox Television Stations Inc., and Fox Basic Cable, Inc. (collectively "Fox") hereby respectfully submit their reply comments in response to the Commission's Fourth Further Notice of Proposed Rulemaking in the captioned video dialtone proceeding. 1/

1/ Telephone Company-Cable Television Cross Ownership Rules (CC Docket No. 87-266) and Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service (RM-8221), Fourth Further Notice of Proposed Rulemaking, FCC 95-20, released January 20, 1995 (hereafter "Notice").

Fox has a strong interest in this proceeding because of Fox's role as a broadcaster, a producer of video programming, and a programmer of cable TV channels. Fox welcomes the added competition that local telephone companies (LECs) will bring to the video marketplace. Fox urges the Commission to regulate competing multichannel video providers in an evenhanded manner, and to ensure that LEC systems negotiate individually for the rights to retransmit broadcast or other programming over the LEC's network. See Comments of NBC, Inc. at 14.

I. The FCC Should Acknowledge the Cable Nature of a Telephone Company Providing Programming on Its Own Network and Treat Cable Companies and Telephone Companies Identically.

The threshold question in the Commission's Notice is whether telephone companies that are also acting as programmers on their video systems should be regulated as cable television companies, as common carriers, or as a hybrid of the two.

Most commenters properly commended the Commission for initiating this review of the video dialtone rules in light of the judicial decisions regarding a telephone company's First Amendment right to control programming content. In our view, when a telephone company provides programming either directly or through an affiliate -- when, in other words, it controls both the conduit and the content -- it is replicating traditional cable service and should be regulated as cable operators are.

When the Commission first formulated the video dialtone model, it represented a creative means of generating competition in the cable market, a

creativity made necessary by the Cable Act's restrictions on telephone company entry into video. While extremely innovative in opening the door to telco entry, the video dialtone model has proven problematic in practice, largely because of the difficulty in crafting a common carriage television system that is easily applied to today's marketplace to current television consumer behavior. See e.g., Comments of Cox Enterprises, Inc., at 11.

The judicial rulings of the past year not only free the telephone companies from certain Cable Act cross-ownership constraints, but also liberate the Commission from the need to finesse those constraints through the construct of video dialtone. See Comments of PEG Access Coalition at 8. The entry of telephone companies into the video market -- long propounded by the Commission -- will stimulate competition to the benefit of consumers, and create another distribution channel to the benefit of programmers who have been dependent on a single, multichannel provider. The court decisions now free the Commission to accomplish these important goals directly by acknowledging the right of the telephone companies to enter the video market in all respects, and by ensuring a fair environment through equal treatment of the competing cable and telephone companies.

Indeed, adhering to the video dialtone model would generate far more problems than it could solve. See Comments of NBC, Inc. at 2. Common carriage television, whether through the leased access component of cable or through the tariffed channel leasing of video dialtone, has not proven successful in practice. As numerous commenters noted, the distribution company's incentive to discriminate

in favor of its own programming entity significantly hampers the concept of an open, easily accessible platform. See e.g., Comments of Viacom, Inc. at 21; MCI Telecommunications Corp. at 7. It would be far more prudent to establish regulations that treat both wire-based video providers identically and reflect the realities of the television marketplace. Comments of ABC at 9; Adelphia Communications Corp., et al., at 26.

In our view, therefore, once a telephone company has taken on the role of programmer on its own system, the telephone company has become, for all practical purposes, a cable television operator. As a legal matter, as a policy matter, and as a practical matter, the telephone company should be treated as a cable television operator if it is in the business of providing programming to its subscribers on its own network.

First, a LEC that provides programming directly to subscribers over its own facilities falls squarely within the Cable Act's definition of a "cable system." See 47 U.S.C.A. § 522(7)(C). The same statutory scheme and safeguards that apply to cable television companies logically should apply to the LECs as well, because they fall within that same statutory definition. Such an approach is not only consistent with the law, it also promotes the fairness goal of regulating all companies similarly if they are providing similar services.

Second, equivalent regulation of LECs and cable operators makes sense because it recognizes the practical realities of the television business. Although laudable in theory, a common carrier rubric is unsustainable as a practical matter when the owner of the video platform is also a programmer.

Marketplace realities dictate that the telephone company will mimic, to a significant extent, the way in which cable operators present television programs to the public. Telephone companies will compete head-to-head with cable companies that are programming large blocks of channels and that market programming in tiers or packages to their customers. To provide a competing service, LECs are likely to try to do the same thing. Indeed, in struggling to reconcile their desire to provide a competitive service within the common carrier framework of video dialtone, many LECs promoted the anchor tenant concept, under which a single programmer/packager is allowed to use all or almost all of the system's analog channels. 2/ As another example, LECs argued in their initial comments in this proceeding that placing capacity limitations on their own use of their video dialtone systems is not in the public interest and will hamper their ability to compete. 3/

Third, the product at issue here -- television -- does not easily lend itself to a common carrier model. Common carrier systems generally are transparent to content. The carrier is indifferent to what message it carries, and to whom that message is delivered. For the Commission to require LECs to operate as

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2/ The FCC rejected the anchor programmer approach as inconsistent with a common carrier scheme, Telephone Company-Cable Television Cross Ownership Rules (CC Docket No. 87-266) and Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service (RM-8221), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 260 (1994). As noted above, the FCC no longer needs to reject this proposal, in light of the judicial decisions.

3/ See, e.g., Letter from Raymond W. Smith, Chairman and Chief Executive Officer, Bell Atlantic, to Reed Hundt, Chairman, FCC, March 7, 1995, at 4. See, e.g., Comments of NYNEX at 14; Comments of Pacific Telesis Group, et al., at 18.

common carriers in their provision of video services -- as opposed to their operation of a video network -- is to force an unnatural and artificial structure on the television marketplace.

Finally, continuing common carrier regulation for LECs would maintain the illusion that competitors really would have the ability to provide competing program packages on a video dialtone system. As numerous commenters stated, LEC incentives will be powerful to limit the ability of competing packagers and programmers to use the video dialtone platform. For example, LECs have questioned requirements that they expand channel capacity to accommodate additional programmers. 4/ And in its first commercial video dialtone tariff, Bell Atlantic has imposed a "channel reservation fee" and other charges that could deter prospective programmers from making plans to use video dialtone. 5/ A myriad of other practical barriers to competition can be erected even under a common carrier scheme, accounting and other safeguards notwithstanding.

In sum, the Commission should acknowledge the reality that LECs will be acting as traditional cable operators, both programming some channels and constructing the "pipeline," and regulate them as such, rather than rely upon a

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4/ See, e.g., id.

5/ Bell Atlantic Transmittal Nos. 741 & 742, Revisions to Tariff FCC No. 10 (Video Dialtone Service), January 27, 1995. See Comments of Adelphia at 20, n.33; Cox at 12.

common carrier scheme that would require extraordinary resources to enforce effectively. 6/ See Comments of NBC at 2.

II. The Commission Must Preserve the Freedom of Broadcasters and Other Programmers to Negotiate the Terms of Carriage on Telephone Company Systems.

It is critical that the Commission make clear that programmers and broadcasters continue to have the right to grant or deny consent before any LEC, video dialtone customer-programmer, or other entity, would have the right to transmit programming or retransmit television signals.

If the LECs are regulated as cable companies subject to Title VI, they of course will automatically be subject to statutory retransmission consent requirements. See 47 U.S.C.A. § 325(b)(1); Comments of INTV at 5.

6/ If a LEC objects to Title VI cable regulation, it can always choose to maintain its pure common carrier status and avoid such regulation. Comments of Adelphia at 14. But a LEC should not be able to avoid treatment as a cable operator by hiding behind the appearance of common carrier status.

The FCC also has determined that under a video dialtone system, program packagers must obtain retransmission consent from a television broadcast station prior to rebroadcasting the station's signal. When the FCC adopted its retransmission consent rules 7/, it stated that

> the customer of the video dialtone provider, *i.e.*, the entity actually choosing and obtaining the programming, would be required to obtain retransmission consent. 8/

The FCC's exclusion of LECs from retransmission consent requirements in that order was plainly premised on the LEC's role as a common carrier with no control over content:

> Since a video dialtone provider is merely offering common carrier transport service, with no discretion or control over the content, it is not appropriate to hold that provider responsible for obtaining the consent of the originating station or stations. 9/

If LECs are permitted to provide programming directly to subscribers, we strongly support the comments urging the FCC to make clear that as the "entity actually

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7/ The FCC's retransmission consent rules apply to any "multichannel video programming distributor," which is broadly defined as "an entity such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor or a satellite master antenna television system operator, that makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 C.F.R. § 76.64(d).

8/ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, Report and Order, 8 FCC Rcd 2965, 2998 (1993) (the "Signal Carriage Report and Order").

9/ Id.

choosing and obtaining the programming," *id.*, a LEC would be subject to retransmission consent requirements. See Comments of NBC, Inc., at 5.

The Commission must underscore that negotiations for retransmission consent be undertaken with each customer-programmer individually. Although the Commission asked for comment on channel sharing proposals in the Third Further Notice in this proceeding, nothing in that Notice would suggest that the Commission intended to disturb the existing legal obligation of video dialtone programmer-customers to negotiate for permission to transmit or retransmit any material, whether it is broadcast or non-broadcast. The Commission should make this legal obligation explicit in any final order it adopts in connection with the Third or Fourth Notice in this proceeding.

It would not be legally permissible for the Commission to grant authority to a single entity, whether it is the LEC or a third party, to negotiate for a license or retransmission consent with any programmer or broadcaster on behalf of a group of customer-programmers, even if that group is sharing a channel for transmission purposes. The FCC's retransmission consent rules apply to any multichannel video distributor, and the FCC has established that video dialtone packagers fall within that definition.

In sum, the Commission should take this opportunity to make clear that whatever its choice of regulatory scheme for LECs acting as video programmers, retransmission consent requirements apply to each programmer or packager on any LEC system. The Commission should also reiterate that other

Title VI provisions banning anticompetitive conduct -- such as coercing exclusivity -- apply to all multichannel video providers, including program packagers on video dialtone systems. 10/

Conclusion

For the reasons stated above, the Commission should (1) regulate LECs as Title VI cable operators if they are providing programming and (2) ensure that retransmission consent and other protections are in place, regardless of the regulatory scheme ultimately applied to the LECs.

Respectfully submitted,

By _____
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April 11, 1995

10/ See 47 U.S.C. § 536(a)(2); 47 C.F.R. §§ 76.1300-1302. See also 47 U.S.C. § 536(a); 47 C.F.R. § 76.1301. The restrictions on practices related to carriage agreements apply to "multichannel video programming distributors," which the FCC has defined in virtually the same manner as it defined the term for retransmission consent purposes. Compare 47 C.F.R. § 76.64(d) (retransmission consent) with 47 C.F.R. § 76.1300(c) (carriage agreements). The statutory definition of "multichannel video programming distributor" is also the same for both provisions. See 47 U.S.C. § 522(12).

CERTIFICATE OF SERVICE

I, Candyce L. Andujar, hereby certify that on this 11th day of April, 1995, copies of the foregoing "Reply Comments of Fox Broadcasting Company, Fox Television Stations Inc., and Fox Basic Cable, Inc." were served by hand on the following:

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